AN ANALYSIS OF AMERICAN JUDICIAL ADMINISTRATION AND THE PROBLEM OF ITS REFORMATION.*

BY AMERICAN judicial administration is meant the general plan of administering justice in the courts throughout the United States of America at the present time; not the federal courts as distinguished from the state courts, but the system of law, courts and procedure generally in operation throughout the country, of which the federal courts as well as the state courts constitute parts.

That one general plan of administration obtains everywhere in the country will appear at a glance when we come to analyze it. In the first place, it is now well recognized that the federal courts enforce no separate body of law of their own, although they observe many statutes and rules peculiarly applicable to their practice. Law is applicable to a territory or geographical division of the country, and not merely to a court, or system of courts; and in that territory all the courts of whatever origin must respect all the law which applies to it.[1]

Again the federal courts' jurisdiction like the state courts' jurisdiction is split up geographically into separate districts, which are as distinct from each other as the States, or as the several judicial districts within the States to which the jurisdiction of the nisi prius courts of the States is limited.

It is true that the federal courts are a more nearly unified

*EDITORIAL NOTE: For a series of four articles on *"The Problem of Reforming Judicial Administration in America,"* by the same author, see 1 VA. LAW REV. 297; 3 VA. LAW REV. 1; 3 VA. LAW REV. 598; 4 VA. LAW REV. 612.

[1] "From the character of all Federal law, as Law of the Land, in State area it follows: that where the Federal law deals with one portion of some particular field of action, and a state deals (consistently with the Federal law) with another portion of that field, the Federal law of the subject, and the State law of the subject, fuse together, and form, *pro tanto*, a single homogeneous Law of the Land; any unassimilable feature of State law being nullified."—PRINCIPLES OF FEDERAL LAW, by H. W. Chaplin, § 89. Washington, 1917.

system than the state courts, but the federal appellate courts are entirely separate from the courts of first instance, so that the unity of the system does not go much beyond the subjection of all the district judges to the power of the administrative authorities to send them temporarily to hold court in other districts than their own; [2] and some of the state courts are already organized on that principle.

Again the procedure and the method of submitting a case to the jury for their final decision is not essentially different in the federal courts from what it is in most of the state courts. The federal judges usually exercise more power over the juries and over the trial of causes than do the judges in the state courts; but that is probably due more to the fact that the federal judges hold office upon practically life tenure; while the vast majority of the state judges hold their seats on the bench by popular elections.

The general plan in the two systems may be said, therefore, to be the same.

So too there will not be found essential differences between the plan of administering justice in one part of the country and that of administering it in another. Of course, when we come to study the details of the several courts and their procedure for the purpose of selecting the features apparently most efficient for the ideal court which we may attempt to construct, we will note many differences between the laws and court practice of Massachusetts and Mississippi, for example; but with the possible exception of Louisiana, there is no difference worth noting for our present analysis between the general plans of any of the several States.

[2] See U. S. Judicial Code of 1911, Sections 13, 14, 15 and 16. After providing in Sections 13, 14 and 15, that the circuit judge of each circuit in which a federal district lies, or in his absence the circuit justice or in his absence the chief justice may designate a judge of another district to fill a vacancy or to meet an emergency, Section 16 provides that, "Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment."

Let us attempt to describe the general plan.

It is founded upon the leading principles of the English common law as recognized on this continent at the time of the American Revolution,[3] explained or enlarged by the enactments of early legislatures, but materially limited by the late Eighteenth Century conceptions of personal liberty, crystallized and fossilized in the state constitutions. Thus by far the greater part of the *corpus juris* is unwritten.

Upon this generally uniform foundation has been set up a cellular system of courts, adopted largely from Revolutionary France,[4] by which the jurisdiction of each court is limited to a territory defined by statute, and the jurisdiction over the individual is generally confined to the court of the geographical division in which he happens to reside. In some instances their jurisdictions are limited also in subject matter; preserving the old English conception that the different departments of the law can be administered best separately. And in other instances their jurisdiction of subject matter is complete or almost complete; but even in those instances the jurisdiction in the different departments of the law is applied separately, the merger consisting merely in the extension of the authority of every court over the whole subject matter of the law.

A supreme or appellate court in each State is usually given supervisory jurisdiction by the state constitutions over the entire system of state courts, but this has not generally included the power to affect the separate jurisdictions; for they are usu-

[3] It is not overlooked that the American Colonies did not recognize as binding upon them the entire body of English common law then recognized in England. The colonies recognized and adopted only those portions of the English *corpus juris* consistent with colonial life and institutions, and at first that was much less than the average well informed reader would suppose. But by the time of the American Revolution English law, along with English culture, had been greatly extended among the colonial settlements; with the result that the courts had come to recognize about all the common law not exclusively applicable to Britain and British society. For a review of the extent of recognition of English law by the early American colonists, and its history in each, see an essay by Paul Reinsch in Vol. 1 of SELECT ESSAYS ON ANGLO-AMERICAN LAW.

[4] For a description of the Courts of France as created by the Constituent Assembly, see 10 ENCY. BRITT., 11 ed., 921.

ally so fenced off that a cause of action begun in one court cannot be reviewed and remanded to another, or to a different department of the same court empowered to adjudicate phases of the litigation which have been misunderstood. The trial of a cause, except in the appellate courts, is usually presided over by one judge only, whether sitting with or without a jury, and in trials of matters submitted to a jury for decision, his duties are practically limited to ruling upon the admissibility of the evidence, stating the issues after the argument of counsel, and giving the jury a general outline of the law for them to apply in reaching the verdict, which actually decides the cause. Special findings of facts by the jury for the subsequent application of the law by the court, are rare.[5]

The method of approaching our American Courts—that is to say, the courts of first instance—is in most of the States by a procedure substantially old English in form, although the logical accuracy which appertained to the old English procedure has been in the main destroyed by statutory attempts at simplification; so that to proceed safely it is necessary to know both the statutes and the extensions put by the higher courts on the old common law procedure as well, so that after all it requires almost as much detailed learning as was required of the pleader by the early law.

And finally this procedure is exercised by a Bar, much freer from control by the court than the English original, and under no definite obligation to obey any self-imposed rules fixed by the profession as a whole as to the conduct of the cause. Therefore the administration of justice is probably as much under the control of the litigants themselves as of the government, and is essentially an outgrowth of our democracy.

It is unnecessary to rehearse to professional readers the many points in which this system, as above summarily described, falls short of the needs of modern society. It will suffice to note its most important deficiencies. For instance, the

[5] In Wisconsin, as I am informed by Mr. Justice Marshall, just retired from the Wisconsin Supreme Court, it is the usual custom to submit a case to a jury with instructions merely to report the facts.—The Author.

recent multiplicity of judicial decisions and the overlapping of statutory enactments have made the common law itself hopelessly uncertain; and what is more fundamental, as first noted by Professor Pound, the old individualistic character of the common law itself has been entirely outgrown by the collectivist tendencies of modern society.[6]

Again, the theories of civil rights set out in the state constitutions have prevented the normal development of the machinery of law enforcement, so that it has not kept pace with judicial experience. Moreover our cellular system of courts with their separate jurisdictions both as to territory and subject matter, has cut the administration of justice into water-tight compartments; while modern efforts to simplify procedure have impaired the former facility of determining the issues. And, lastly, the Bar has become so large and so unrestrained that it has lost much of its efficiency as an aid to the courts in discovering and administering justice.

But after all, our present system is still a working system, whose parts as a result of long operation, still fit together, and by reason of its being in actual operation, its parts have become so interdependent that no one of them can be greatly changed without involving material alterations in the rest.

Consider the *corpus juris,* the body of substantive law, as recent scholars have begun to designate it. While it is undoubtedly still based upon the body of English law analytically set out by Blackstone, the system received from England in common by all the States has been so altered in each State during the last hundred years by statutory enactment and judicial interpretation that it is no more the original than the English language of today is the language of Spenser and Chaucer. It still possesses all the flexibility of the law of the time of Lord Coke, which is probably its greatest virtue; and yet its uncertainty, which is its greatest inherent weakness, and which has increased more and more as judicial and statutory extensions have broadened its scope, can be cured by no suggested reform which will not destroy its flexibility and at the same time involve

[6] REPORT OF AM. BAR ASSN. for 1906, p. 395.

the destruction of the fundamental relation between law and equity.

To make our body of law certain, the only practicable plan which is suggested is codification—not the codification which was accomplished for the Roman law under the authority of Justinian; for that was largely a mere restatement of interpretative opinions, a plan of codification incompatible with our present English and American conception of the effect of a judicial decision. The Roman plan of restatement has been pursued in principle for sometime now by various private enterprises in America; and while it has great present value, it has little or no permanent value, as is revealed by the ever increasing number of editions of the cyclopedias, the very advertisements of which emphasize the problem.

The only codification which can make the law certain is the statutory codification already being begun by the Negotiable Instruments Law, and other carefully drawn laws designed to cover in full the subjects of the law to which they relate. That is the kind of reform of our body of law which students of jurisprudence have long told us we must eventually accept;[7] and yet we cannot doubt that if all our legal rights were at once set out in rigid statutory form, much would be made permanent which a few years of experience would prove inacceptable without some power like a court of equity to modify it.

The present flexibility of our law, at first thought, then would seem almost to atone for its distressing uncertainty. But if we conclude that it does not, and resolve to attempt to reform and codify our substantive law, let us see what changes of the procedure and judicial machinery are necessarily involved.

Recent writers usually employ the term adjective law to describe procedure and the machinery of judicial administration. They adopted the term from the late English writers upon jurisprudence;[8] but it is entirely inapplicable to the common law.

[7] 3 AUSTIN, JURISPRUDENCE, note on codification. See also 6 ENCY. BRITT., 11 ed., 632, title "Code"; Nathan Isaac's *"The Schools of Jurisprudence,"* 31 HARV. LAW REV. 373.

[8] Holland employs the term for remedial rights and the principles of applying them—the law which exists to enforce "substantive" law. See

It involves a clear division such as is made by the science of jurisprudence based upon the law of Rome and the modern code countries between an abstract legal right and the right to enforce it, whereas by reason of historic development of the common law no such division of the common law can be made. The formulated science of jurisprudence teaches us that every legal right involves a correlative obligation or duty; that whenever a right inheres in one person, an obligation or a duty must inhere in another to satisfy the right (unless of course the right is considered with reference to some tangible thing actually in the owner's control); and that every inhering legal right must be antecedent to a remedial right to enforce the observance of the obligation or duty by the person upon whom it falls.[9]

This is clear enough so long as we are considering a system of law so complete that the rights which it recognizes may be stated in abstract propositions. But the common law of England and America has never yet reached that stage of completeness. It has never gotten beyond contemplating rights and duties from the mere viewpoint of concrete cases.

In the infancy of the common law, when one of the king's subjects encroached upon some customarily respected privilege of another, the offended subject appealed to the king or his viceroy with a statement of the complaint; and if his appeal was effective, he was rewarded with a special written command under the king's private seal, which was called an original writ,[10] addressed to a sheriff, and directing an investigation of the complaint and the proper reparation. A typical writ of the Twelfth Century was in the following language:

> "The King to the Sheriff, Health. Command A. that, without delay, he render to B. one Hyde of Land, in such a vill,

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HOLLAND, JURISPRUDENCE, 9 ed., pp. 84, 157, 337. He seems to have gotten the term from Bentham. Austin never used the terms "substantive law" and "adjective law."

[9] HOLLAND, JURISPRUDENCE, 9 ed., p. 85, *et seq.*

[10] In early legal history it was called in Norman French a "breve." "When causes became so frequent that the king was unable to attend to them," says Craig, "he remitted them to the judge, by means of instruments containing a brief summary of the chief points. Hence the name 'breve.' (CRAIG, JUS. FEUD. L. 2 Dieg. 17, 24.)" BEALE'S GLANVILLE, p. 4, n. 4.

> of which the said B. complains that the aforesaid A. hath deforced him; and unless he does so, summon him by good summoners, that he be there, before me, or my justices, in crastino post octabas clausi paschae at such a place, to show wherefore he has failed; and have there the summoners and this writ.
>
> Witness Ranulf de Glanville, at Clarendon." [11]

The origin of these original writs, as the formal commencement of a suit, is lost in antiquity; [12] and we only know that down until the Statute of 2 William IV. Chapter 39, in England no suit could be commenced without one.[13] All original writs were issued out of chancery, and were prepared by some one of the clerks in the name of the King's Chancellor. The clerks kept parchment rolls of forms of writs which had been issued from time to time and which served as precedents for future issues. Most of them could be issued as of course, without any especial authority from the chancellor for the particular case; but the rolls include also, we are told, many examples showing the exercise of particular consideration of some complaint deserving of relief, and thus forming new precedents for future extensions of the administration of justice.[14]

It is sufficient for our present purpose merely to note Frederick W. Waitland's conclusion that there was no authentic permanent register of allowable original writs kept in the mediaeval chancery, but that the rolls of precedents kept growing with the appointment of each chancellor and the rise of each new set of inventive clerks, until the so called "Register" reached its final form in the printed volume published by John Rastill in 1531.[15] What is important for us to emphasize is that the several states of fact upon which a subject could base his complaint and procure the issue of an original writ were all con-

[11] BEALE'S GLANVILLE, p. 5.

[12] MAITLAND, REGISTER OF WRITS; 2 ANGLO-AM. SELECT LEGAL ESSAYS, at p. 560. And see STEPHEN, PLEADING, appendix, note 2, quoting authorities for various origins of the custom.

[13] STEPHEN, PLEADING, p. 5.

[14] MAITLAND, REGISTER OF WRITS, p. 557.

[15] Professor Maitland's illuminating essay begins on p. 549 of "SELECT ESSAYS." It appeared first, however, in Volume 3 of the HARVARD LAW REVIEW in three sections, published in 1889.

crete cases. The right to a writ was not based upon a formulated principle of law; it depended upon the king's or the chancellor's common sense of justice. This is proved both by the historical fact that the chancellor or his clerks could invent writs for such special cases as impressed their conscience, and by the further fact that if such a writ did not appeal to the sense of justice of the judges of law before whom it was returnable, the writ could be quashed as illegally issued. "The granting of a newly worded writ was no judicial act; to grant one which could not be maintained was no act of justice; it might be a very proper experiment." [16]

But if the issue of original writs depended merely upon concrete cases of fact, and in no sense upon formulated legal principles, we are forced to the conclusion that there was no cognizable system of common law rights. It is true that from the earliest period of the English reports of cases, the writs and the suits which were begun by them were called by the words representing the key notes of the respective proceedings, such as "mort d' ancester," "novel disseisin," "dower," "warrantia chartae," "trespass," "covenant," etc., and these actions by a transposition of ideas, have come in modern times to represent a fragmentary system of legal rights, approximately complete in so far as the entire register of writs comprehended the sum total of special cases which would appeal to an ordinary man's common sense as deserving relief. But that does not affect the truth of the observation that they represent but a collection of concrete special cases and do not rest upon legal principles as a basis; and if further verification is desired, it may be found in the history of the extraordinary jurisdiction of the court of chancery, what we now call equity jurisdiction. When the invention of original writs had been extended until the Register had approached the proportions in which it has come down to us, it seems to have become exceedingly difficult to procure a writ for a special case which would be allowed to stand,[17] and when cases came to the attention of the chancellors beyond the reach of any of the writs which they were accustomed to issue, they began

[16] MAITLAND, REGISTER OF WRITS, pp. 558, 559.

[17] STEPHEN, PLEADING, 6, 7, 8; STORY, EQ. JUR., chap. 2.

to consider the case upon its own merits summoning the defendant to answer before the chancellor in person. This exercise of judicial prerogative was based expressly upon the defect of the recognized writs to cover the special case, and the award was called the application of equity merely because morality and royal policy directed that some relief be given. It was not the sort of equity administered by the praetors in ancient Rome to soften the rigors of the rules of law; but a remedy made out of whole cloth because there was no principle of law which applied to the case at all.

By whatever side we approach the common law, therefore, we come upon the fundamental historical fact that it consists merely of a collection of remedies, and that the only rights which it has ever ecognized are the rights to the several remedies, dependent in each case upon a concrete set of facts.

And we need not prolong the discussion by proving that this is just as true of the common law today as it was of the common law of the time of Glanville, and that the six hundred years of common law development from Richard II to Victoria have not produced for us a system of legal rights and obligations, a system of antecedent rights and consequent rights, a system of substantive law and adjective law, merely because the common law has always been based upon special cases and does not lend itself to anything else. Holland was eminently correct therefore when he said in the preface of the first edition of his "*Jurisprudence,*" that "the law itself as expounded by Coke and Blackstone, except so far as it has been deduced with much logical punctiliousness from the theory of feudal tenure, is little more than a collection of isolated rules, strung together, if at all, only by some slender thread of analogy."

There is no gainsaying that English and American law, that is to say, the common law, has been terribly neglected as compared with the law of the leading continental countries, in being allowed to grow almost as it would, instead of being assisted by constructive law builders from time to time, moulding it into an approximately complete system of principles stated in abstract form. But English and American statesmen have not as a rule given much attention to that sort of constructive work.

Those responsible for the government left the law to develop merely through judicial decisions and the slight statutory amendments demanded by exigencies as they arose.

It is true that the courts have extended the law much more than is often realized, although Blackstone, and not a few able if incautious jurists who followed him, denied that the courts have such a function;[18] and it must not be overlooked that from the completion of the Register of Original Writs, as we have seen above, and the establishment upon a firm foundation of the extraordinary jurisdiction of the English Court of Chancery, equity has done much to fill out the gaps in the common law. No doubt the intelligent development of the principles of equity in the Seventeenth, Eighteenth and Nineteenth Centuries by Nottingham, Hardwicke, Eldon and the great Victorian equity judges prevented the formation of a demand for codification in England.[19] Indeed, during the two hundred and fifty years following the reign of Henry VIII even the statutory changes in the law of England were comparatively few.

But, in the light of modern social conditions, the need to fill up the gaps in the common law by adding new rights is becoming daily more apparent in America. We want an enlarged rounded out system of rights, a comprehensive system defining much more clearly the relations of capital to labor, the relations of large property ownership to small property ownership, the relations of collective ownership to individual ownership, the relations of organizations to the public, and the relations of commercial industrialism to the State. The common law and equity are hazy on these subjects, and the statutes we now have are generally fragmentary. We also need, in almost every State, to rewrite the law of real property.

But if we succeed in filling in the gaps between the old common law writs by creating in statutory form a complete system of rights expressed as abstract principles, the new rights we

[18] See 2 BLACKSTONE, COM., pp. 68, *et seq;* HARGROVE'S CO. LIT., 66. Every student of AUSTIN'S JURISPRUDENCE is prepared to refute Blackstone's fallacy.

[19] English scholars even now doubt the need of it. See 6 ENCY. BRITT., 11 ed., 632.

create will have no writs to fit them. And besides, the heretofore comparatively well defined principles of equity jurisdiction will be so blended with the newly created statutory principles and rights that the old division between law jurisdiction and equity jurisdiction can be no longer maintained. Hence we must conclude that such a restatement of the law as will meet the demands of modern American society involves the merger of law and equity jurisdiction and the invention of new forms of action to enforce the new legal principles. And finally we see that if the new statement of the law in the form of abstract principles is even approximately complete, it must cover the rights which were enforced by the old common law writs, as well as the rights to be created to fill out the gaps between them; and if new form of action must be devised to enforce the broad abstract principles *in limine,* there will be no need to preserve the old original writs at all. Indeed, their scope will be so fragmentary compared with the new actions, that no pleader would care to avail himself of the old writs.

But whether we decide to abolish the present system of writs and actions or whether we prefer to leave them to fall gradually into disuse, what we set out to determine was how far the reform of our body of substantive law by the creation of a code involved also the reformation of our present system of procedure and our present system of courts. And it is now evident that the creation of a systematized code involves of necessity the fusion of our present systems of law and equity, the abolition of the distinctions of jurisdiction between the two courts, and the elimination of the value of availability of all the present original writs and forms of action. And this must be taken into consideration when we consider the primary question whether we wish to undertake a real reform of our substantive law.

It is unnecessary for the present consideration to say more than that the distinction between the present jurisdiction of law and equity courts must be abolished. It may well be that practical experience would direct that those rights which approximate respectively to the present legal and equitable rights should be separately adjudicated and perhaps separately ad-

ministered. Under the attempted fusion of law and equity in England under the Judicature Act of 1873, the old division between law and equity courts was largely preserved. And while the English judicial reform was by no means as fundamental as that which would be involved in the creation of a code of legal rights, their plan, as we shall see, involved the conception of a system of rights apart from the actions by which they are enforced, and as such they find that rights may be classified with references to different courts provided to enforce them. The value of the division must be resolved largely into the practical adaptability of the different judges to different branches of the law, and the inherent inability of even the average good mind to master and retain proficiency of the whole *corpus juris*. But that is a question of detail for later consideration. For the question in hand it is enough to note that the creation of a complete code involves the abolition of the ultimate distinction between court jurisdictions and the creation of a new system of procedure.

Of course, it is conceivably possible to prepare a code or formal restatement in abstract form of all the legal and equitable rights now recognized by the law in each State without filling in the gaps between the rights; that is to say, to make a code of the law as it is, without adding any new law to make the law what it ought to be. And for such a collection of rights, if they could be so restated without addition, it would not be necessary to invent any new forms of action; the old writs and forms of action, supplemented by bills in equity, would be just as sufficient as they are now.

Therefore, if that sort of reformation of the substantive law is all we care to undertake, it would not necessarily involve a total recasting of our procedure, nor would it involve a fusion of law and equity jurisdiction to enforce it.

It is interesting to note in this connection that certain English scholars seem to be of the opinion that such a code, a mere formal recasting of the present law to make it accessible and certain, is all that England needs today, since they think that the statutory additions to the common law accomplished from time to time in recent years have made a body of rights ap-

proximately satisfactory;[20] and yet the Judicature Acts, beginning in 1873, and the Rules of Court adopted in 1883, abolished the old forms of action in England and nearly abolished the division between law and equity jurisdictions as well. If the line of reasoning we have been pursuing is sound, therefore, we must either conclude that the English *corpus juris* had been much more scientifically amplified by statutes from time to time, prior to 1873, than that of any of the American States, and that the system of rights had grown top heavy for the Register of writs and the courts of equity by that time, or we must conclude that the establishment of a new system of procedure and the fusion of law and equity in England were actually unnecessary at the time they were established.

Of course, the exact point at which the number of judicially created rights and rights created by statute in England or in a given state have outgrown the old forms of action, is a question of degree or opinion, which only those who practice or administer law there can determine. It is indeed very probable that English law had not greatly outgrown the original writs in 1873, and that the adoption of the new system of procedure was, theoretically at least, unnecessary at the time. It is even doubtful whether that particular reform greatly facilitated the administration of justice; for some of England's greatest jurists emphatically asserted after trying the new system of pleading that it did positive harm.[21] But the judges who prepared the new rules of procedure in 1883, in a sense recognized the existence of legal rights broader than the old forms of action; for they abolished demurrers in the new pleading,[22] and created a new set of forms in which claims should be pre-

[20] 6 ENCY. BRITT., 11 ed., 634. The soundness of this view may well be doubted however, when we note also that the article was really written for the 9th edition of the BRITISH ENCYCLOPEDIA, published in 1883, and there have been considerable changes in the statute laws of England since that time.

[21] See the opinion of Lord Esher, in 1880, 29 ENCY. BRITT., 10 ed., 292, and views of Lord Justice Davey in 1903, 30 ENCY. BRITT., 10 ed., 146. And compare the views of Sir Frederick Pollock in THE EXPANSION OF THE COMMON LAW, 1904.

[22] Order 19, Rule 20.

sented for adjudication. So it may well be that the statutory and judicial expansion of the common law in England by 1883 had reached a point where it could no longer be efficiently enforced through old forms of action, and that the administration of justice was materially advanced by adopting the new system of procedure as well as by reforming the courts.

And this is the angle at which reformers in each of the American States should approach the question whether their body of substantive law is ready for reforming by codification. If it has not yet become too uncertain, or too much expanded by amendatory statutes to be fairly well enforced through the old forms of action or their modern modifications, it is unnecessary if not actually dangerous as yet to undertake the task of codification and the accompanying problems of creating a new procedure and abolishing all existing divisions of jurisdiction in the courts.

Such is probably the condition of the law in most of our newer States; and under such circumstances the administration of justice should not be radically changed there.

But in the older States where the courts and the legislatures have been amplifying the common law for a hundred years or more, and where the character of the population and their occupants have so changed since the common law of England and the early state constitutions were adopted, that much new legislation is needed to round out the body of law, unquestionably reformers should advocate a systematized code, to be prepared by a commission authorized to expand as well as to restate the law. And as incidents to the new system of substantive law they must provide a new system of procedure and a reformation and unification of the jurisdiction of their courts and law administering machinery.

Sir Henry Maine first noted that the body of law of every civilized people or State passed through three different stages, which might develop evenly or irregularly, and which might pass rapidly or might consume centuries in transition. By the opening of authentic history the law will have reached a rigid although perhaps still archaic form. Such is the period of the Twelve Tables of 450 B. C. in Rome, and the period when the

system of original writs was being completed in England. The next stage is that of expansion by legal fictions and amelioration by equity, the stage represented by the institution of the Praetorian Actions in Rome and the establishment of the Court of Chancery in England. And the third stage begins when the law-making bodies recognize the inadequacy of equity alone as a means of ameliorating and patching the old legal crust, and begin creating new rights and duties under their authority to establish positive law.[23]

Maine's interesting historical analysis has now become recognized as a fundamental principle of historical jurisprudence. But it seems to have remained to be discovered by a very modern scholar that Maine's analysis was incomplete. Professor Nathan Isaacs of the Cincinnati Law School has recently pointed out [24] that after the stage of legislation has advanced in a state to where the law has become uncertain and irregular from fragmentary amendment, a general demand for systematic codification always arises; and that this fourth stage when completed will be found upon a prospective examination of the whole process to be in fact no new stage at all, but mere recurrence of the first stage of all.

Thus he demonstrates that the law of every country develops in cycles which recur as civilization advances, whether in ancient, mediaeval or modern times. And this is his table:

Codification.
Glossation (word-study and Legal Fictions).
Commentation (principle-study and Equity).
Legislation (conscious modification).
Codification.

Now it is immaterial whether as individual students of jurisprudence we prefer the comparative or historical school of Sir Henry Maine, or whether we prefer to work out our conclusions on purely logical theories like those of Jeremy Bentham or Austin, or whether we prefer merely to consider what the law ought to be, this analysis of historical development ap-

[23] MAINE, ANCIENT LAW, chap. 2.
[24] 31 HARV. LAW REV. 373, *"The Schools of Jurisprudence."*

plied to the common law reveals clearly the relation of codification to the primitive original writs. First there were the simple writs, the only legal rights recognized. Then these were added to and stretched by fiction to apply to somewhat different sets of fact, as in the various applications of the action of trespass on the case to indirect injuries, trover and assumpsit. Then equity came into operation by awarding remedies when the old writs could be stretched no further. Then statutes were passed providing that the old action might be applied to certain additional cases, even if they did not actually meet them. Then all sorts of new rights were created by statute. And now we are considering codification.

We see that as the rights are increased, the writs or forms of action must be increased along with them; and thus we come gradually to the conclusion which we set out to prove, that if the whole body of rights is to be restated, the whole collection of actions must be reformed also, and the line of demarcation will have to be set anew between those rights to be enforced in what we have called our law courts and those to be enforced in what we have called our equity courts, if indeed any distinction between the jurisdiction of the courts needs to be preserved at all.

Having thus demonstrated, it would seem with sufficient clearness, that our body of so called substantive law, our courts and our court procedure are so interlocked as an entire working system that the body of law cannot be materially reformed without entailing the reform also of our system of courts, and of our system of procedure, it appears unnecessary to prove in detail that the fusion of the law and equity jurisdictions of our courts would be illogical and of little value unless it is done merely as part of a plan to expand the existing body of legal rights; and that the abolition of all the existing forms of action would be mere iconoclasm where the forms of action abolished cover all the recognized legal rights, or can be made to do so by slight statutory enactment. And yet many of the plans for court reform and simplified pleading have been begun on such an ill-considered basis. Indeed, most of the plans for judicial reform, even including the first New York reform

of 1848, beginning with the reform of procedure and the consolidation of jurisdiction of the courts, may be criticised as having approached the problem backwards.

It would seem the better plan that the reform of the body of law should be considered first; and then if it is decided that the *corpus juris* requires no revolutionary reformation, the courts and the procedure may be intelligently considered, the reformers always bearing in mind that until the system requires entire reconstruction, mere amendment and readjustment is the method of reform far the most likely to produce satisfactory results.

To demonstrate to reformers the advisability of proceeding by this plan is the purpose of this essay.

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